Supreme Court, U.S.
FILED
OCT 16 1991
OFFICE OF THE CLERK

(2)

No. 91-530

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND ADMINISTRATION,
STATE OF ARKANSAS
PETITIONER

v.

ILLINOIS TOOL WORKS INC.
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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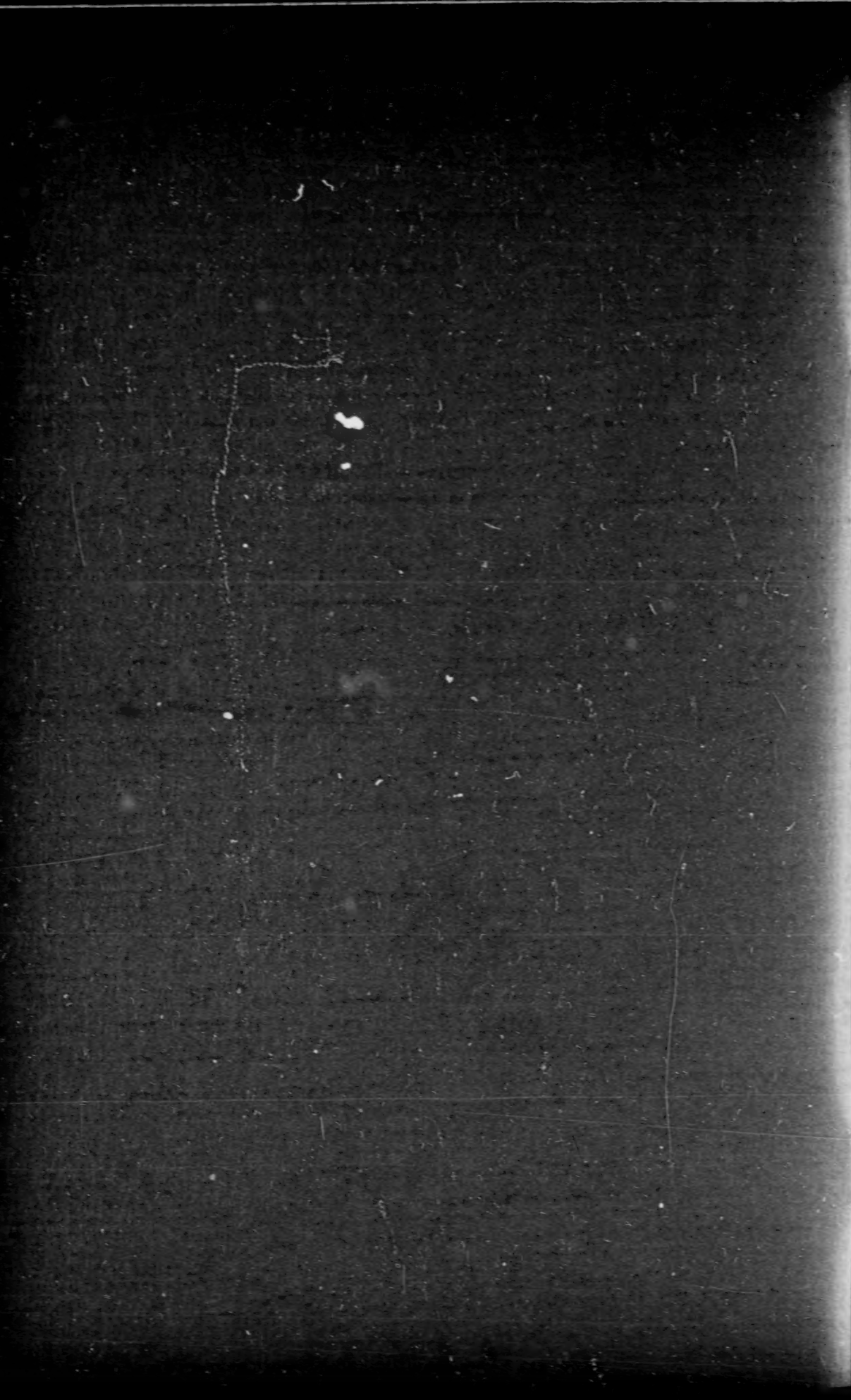

QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court correctly adopted and applied the "unitary business principle" (mandated by this Court's prior decisions) in determining that the capital gains realized by Respondent from its sale of certain stocks of other companies were "nonbusiness income" for Due Process and Arkansas' UDITPA purposes, because the Respondent and these other companies conducted separate and discrete businesses?

2. Whether the Arkansas trial court's factual findings that the capital gains realized by Respondent from the sale or liquidation of certain capital assets resulted directly from activities that were not an integral part of the Respondent's regular manufacturing or leasing businesses (which findings were made solely under state corporate income tax and were specifically affirmed by the Arkansas Supreme Court) provide an appropriate or proper basis for this Court's review, under the Due Process provisions of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration. At present, Petitioner is the duly appointed and serving Director of the Arkansas Department of Finance and Administration. As the Director, he is the appropriate official to be named as the representative party in this action, pursuant to the provisions of Ark. Code Ann. § § 26–18–104(2) and 406.

Respondent Illinois Tool Works Inc. (ITW) is a publicly traded company that is incorporated in the State of Delaware, but which maintains its principal place of business and commercial domicile at Glenview, Illinois. ITW has no parent corporation, but it operates under at least 17 separate divisions in the United States and the company owns a 100% interest in numerous domestic and foreign subsidiaries. The Respondent also owns less than a 100% interest, but greater than a 10% interest, in the following foreign or domestic subsidiary or affiliate corporations:

Accurex Manufacturing GmbH (Germany) (wholly owned by Lubricating Systems, Inc.); Andrex S.A. France (France) (ownership interest by Andrex Radiation Products A/S); Envases Multipac, S.A. de C.V. (Mexico); Etanco, S.A. (Spain) (ownership interest is by ITW Espana S.A.); Gerrard–Signode Pte. Ltd. (Singapore); Hankook–Signode Ltd. (Korea) (ownership interest is by Signode Corporation); INCAP – Industria de Carregadores Plasticos S.A. (Brazil); ITW Fixfast AB (Sweden); ITW Mapri Industria e Commercio Ltd. (Brazil) (94% owned by Illinois Tool Works Inc.; .3% owned by ITW do Brasil Participacoes Ltda.; ITW–Nifco Inc. (Delaware); Inmobiliaria Cit. S.A. de C.V. (Mexico); Kormag Industries e Comercio Ltda. (Brazil); Magnatek ApS (Denmark) (ownership interest is by Andrex Radiation Products A/S); Multipak de Venezuela C.A. (Venezuela); Nagarjuna Signode Limited (India); New Korea Pasiode Co., Ltd. (Korea) (ownership interest is by Pasiode Corporation); Nideco

K.K. (Japan) (55% owned by Illinois Tool Works Inc.; 22.5% by ITW Kabushiki Kaisha); Nif-Cone Leasing Ltd. (Hong Kong); Packaging Leasing Systems Inc. (Delaware); Ransburg Equipamentos Industrials Ltda. (Brasil) (ownership interest is by Ransburg Industrial Ltda.); Signode Kenya Limited (East Africa); Venture Tool, Inc. (Wisconsin).

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Illinois Tool Works Inc. ("ITW") respectfully requests this Court to deny the Petition for Writ of Certiorari filed by the Petitioner James C. Pledger on behalf of the Revenue Division of the Arkansas Department of Finance & Administration. The petition seeks a review of the decision by the Supreme Court of Arkansas entered below in favor of the Respondent, at 306 Ark. 134, 812 S.W.2d 101. This case presented the Arkansas Supreme

Court with the opportunity: (1) to adopt and apply to Arkansas' corporate income tax law the "unitary business principle" standard mandated by five prior decisions of this Court; (2) to overrule its own *Montgomery Ward* decision that had erroneously adopted the "full apportionment" standard for Due Process analysis purposes; and (3) to declare both the corporate income tax regulations and a policy statement position adopted by the Petitioner, in implementing Arkansas' version of the Uniform Distribution for Tax Purposes Act ("UDITPA"), to be unconstitutional as violative of the provisions of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Though the Statement of the Case presented by the Petitioner covers the origin of the dispute, the administrative proceedings, the factual and legal positions of the parties, the evidentiary record established at trial, and the holdings of both the trial court and the Arkansas Supreme Court; the Petitioner's presentation minimizes the factors considered important by both the trial court and Arkansas Supreme Court in deciding this case for the Respondent, but then dwells upon minutia or cites facts out of context, so that the overall presentation of this case is so skewed as to appear to favor the Petitioner's position. Based upon the admonition contained in this Court's Rule 15.1, that Respondent has an obligation and duty to point out perceived misstatements of fact or law contained in the Petition, the Respondent is compelled to set forth what it believes is a more objective and realistic statement of the record in this case, and to bring to the Court's attention certain matters that were either omitted or not emphasized by the Petitioner.

In this regard, ITW notes and incorporates by reference here the extensive findings of fact made by the Chancellor in the Pulaski County Chancery Court, which findings of fact (¶ ¶ 1–14) are reproduced on pages B–1 through B–12 of Appendix B to Director Pledger's Petition.

To begin with, utilizing Arkansas' UDITPA provisions, ITW apportioned a substantial amount of "business income" to Arkansas and paid a substantial amount of Arkansas corporate income taxes during the years 1981 through 1983, on what was described as a marginally profitable manufacturing plant located at Pine Bluff, Arkansas. (R. 236; Pet. App. B, ¶ 5) In filing its Arkansas corporate returns for each of these years, ITW classified capital gains it realized upon the sale or liquidation of seven particular capital assets managed by personnel in its corporate treasurer's office at its commercial domicile in Chicago, Illinois, as "nonbusiness income," which gains were not apportioned to

Arkansas as part of ITW's "business income." [1]

The types of capital gains still disputed at the Arkansas Supreme Court level by the Petitioner can be classified into two general categories. First, there were capital gains from the sale of minority interests ITW held in two Japanese companies (NIFCO and NISCO), and the sale of a portion of a minority interest ITW held in Computer Products, Inc. (CPI), a domestic company. Second, there were the capital gains realized by ITW from the liquidation of U.S. Treasury Notes originally purchased by ITW at a discount and simply held until maturity, and a capital gain realized from ITW's disposition of a foreign currency contract (balance sheet hedge) where the contract had been held by ITW for two years. All of these capital assets were of a long term nature (i.e. held for much more than twelve months) and they were generally acquired, managed and disposed of by personnel in ITW's corporate treasurer's office at the headquarters and commercial domicile in Chicago, Illinois, which activities took only a small amount of time and attention by such personnel.

The trial court Chancellor made detailed findings of fact regarding the stock of each of the three corporations (Pet. App. B, ¶ ¶ 12A–12C), wherein he found that there was no functional

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[1] Of these seven capital assets, Petitioner's counsel conceded at the administrative hearing level that the capital gains realized from ITW's disposition of all preferred stocks in various utility and banking companies were "nonbusiness income" for UDITPA purposes. Similarly, on appeal to the Arkansas Supreme Court, the Petitioner conceded that the capital gains realized by ITW from the installment sale of the undeveloped "investment" land (farmland) across the freeway from ITW's Chicago headquarters was "nonbusiness income." Finally, all of the capital gains from the seven assets originally questioned by the Arkansas auditor were reported on ITW's Illinois corporate income tax returns for each of these three years, and Illinois corporate income tax was paid by ITW on such capital gains in accordance with the provisions of the controlling Illinois law. (Pet. App. B, ¶ 14) Therefore, the Arkansas courts held that UDITPA's classifications of "business income" and "nonbusiness income" were properly and constitutionally interpreted by the corporate taxpayer in paying income taxes to the State of Arkansas in return for the protections provided by the state.

integration, no centralization of management, nor any economies of scale in the relationship that existed between ITW and NIFCO, NISCO and CPI. The Chancellor found that there was no transfer of value between these companies, but, instead, that NIFCO, NISCO and CPI operated discrete businesses separate and apart from ITW's, and that ITW's holdings in these companies were investments, not an integral part of ITW's regular manufacturing and leasing businesses.

Likewise, the Chancellor made specific findings that the activities of the personnel in ITW's treasurer's office concerning the acquisition, management and disposition of the U.S. Treasury Notes and the single foreign currency hedging contract were not activities conducted as integral parts of ITW's regular manufacturing and leasing businesses. (Pet. App. B, ¶ ¶ 12F and 12G). Particularly, the Chancellor found that ITW's management of these capital assets at its Chicago, Illinois, headquarters was not related to ITW's manufacturing operations at its Pine Bluff Division plant or to its leasing of machinery to beverage companies operating in Arkansas. (Pet. App. B, ¶ 13)

These extensive findings of fact were challenged by the Petitioner before the Arkansas Supreme Court as having no foundation in the evidentiary record and, therefore, were clearly erroneous. Specifically passing upon this challenge, the Arkansas Supreme Court found that the Chancellor's findings of fact in this regard were well founded in the evidentiary record and were specifically approved and affirmed by that court. (Pet. App. A, A-8 and A-9)

In the presentation of the Statement of the Case in his Petition, Petitioner fails to inform the members of this Court of certain circumstances which the Respondent believes are pertinent to the issues that the Petitioner requests this Court review. Respondent believes that the Court's consideration of these facts is necessary for the Court's complete understanding of the positions of the parties and the development of this dispute.

In the mid-1970's, the Arkansas Revenue Division adopted certain corporate income tax regulations (for purposes of interpreting the classifications of "business income" and "nonbusiness income" under UDITPA), which regulations had been promulgated and suggested by the Multistate Tax Commission (MTC). (Pet. App. C) (*Arkansas CCH State Tax Rept.*, ¶ 14,503) These MTC regulations were generally referred to as "full apportionment" regulations, principally because, in concept, they broadly construed the concept of "business income" under UDITPA, and very narrowly construed the concept of "nonbusiness income." (Pet. App. B, Conclusion of Law, ¶ 5)

This "full apportionment" concept used in the MTC regulations was adopted and approved by the Arkansas Supreme Court in its 1979 decision in the case of *Qualls v. Montgomery Ward & Company*, 266 Ark. 207, 585 S.W.2d 18 (1979), as the proper Due Process standard for determining if Arkansas could subject a foreign corporation's income from intangible assets to the state's corporate income tax. In the *Montgomery Ward* case, the Arkansas Supreme Court held that if the intangible income arose from or was contributed to a company's working capital, or was commingled with the company's working capital, that such income from the intangible assets was "business income" for UDITPA purposes. (Pet. App. A, A-4)

Shortly thereafter, during the period from 1980 to 1983, this Court rendered five decisions that established the appropriate Due Process standards to be applied by state taxing authorities in taxing the intangible income of a multistate or multinational corporation. This Court announced the "unitary business principle" standard was to be the controlling test for Due Process "nexus" purposes. See, *Mobil Oil Corporation v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980); *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207 (1980); *ASARCO, Inc. v. Idaho State Tax Commission*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Department of New Mexico*, 458 U.S. 354 (1982); and *Container Corp. of America v. Franchise Tax Board*, 436 U.S. 159 (1983). In the *ASARCO, Woolworth*, and

Container Corp. cases, this Court totally rejected the "full apportionment" definition or standard embodied in the MTC promulgated corporate income tax regulations.

In response to this Court's establishment of the "unitary business principle" as the controlling standard for determining (for Due Process purposes), whether or not income from intangible assets of multistate or multinational corporate taxpayers should be classified as "business income" or "nonbusiness income" for UDITPA purposes, the Arkansas Revenue Division adopted a published position as to how it would administer Arkansas' corporate income tax law following these decisions. The taxing agency refused to accept and apply the "unitary business principle" standard in any instance other than those involving "dividends." In Arkansas Revenue Policy Statement 1984–2 (Pet. App. D) (*Arkansas CCH State Tax Rept.*, ¶ 14,910), the Petitioner's predecessors rejected this Court's mandate in *ASARCO* that the "unitary business principle" was to be applied to income from all types of intangible assets. This Policy Statement specifically held that all such intangible income (e.g. interest, capital gains, royalties, etc.) was still to be decided under Arkansas' statutory definition of "business income" and the MTC "full apportionment" regulations previously adopted by the Arkansas Revenue Division.

Therefore, for the last seven years, the Arkansas Revenue Division has steadfastly refused to apply the "unitary business principle" standard in any UDITPA situation involving interest, capital gains, royalties, etc. The Petitioner's corporate income tax auditors have consistently continued to reclassify capital gains (that corporate taxpayers had classified as "nonbusiness income") as "business income" that is apportionable to Arkansas. In this case, the Petitioner's auditors simply reclassified the capital gains realized by ITW from all seven of the capital assets as "business income," and then proposed the assessment of substantial additional Arkansas corporate income taxes against ITW *without* making any prior contact with ITW or making even a cursory investigation of the facts relating to the disposition of these seven capital assets by ITW.

After the Arkansas Revenue Division's Administrative Hearing Board had sustained the position taken by the Petitioner's auditors, in the spring of 1987, ITW specifically requested the Arkansas Commissioner of Revenues to revise his Administrative Hearing Board's decision and to abate all of the corporate tax deficiency proposed. This request was based upon this Court's holding in its *ASARCO* case that capital gains were to be judged utilizing the "unitary business principle" in the same manner as dividends were to be judged. The Petitioner's predecessor acknowledged this Court's holding to this effect in the *ASARCO* decision, but he refused to apply this rationale to the capital gains issue raised by ITW. (R. 334–339) (Pet. App. B, ¶ 10)

In fact, as late as the time of trial in January of 1990, the Petitioner's corporate income tax auditor testified that he had been instructed to conduct his audits based upon the definitions of "business income" and "nonbusiness income" contained in Arkansas' version of UDITPA, using only the holding of the Arkansas Supreme Court in its *Montgomery Ward* decision, and the limitations placed upon the "unitary business principle," as set out in Arkansas Revenue Policy Statement 1984–2. Finally, the Petitioner's auditor candidly testified that he was not familiar with the five decisions of this Court in the *Mobil Oil, Exxon, ASARCO, Woolworth* and *Container Corp. cases*, and further that he did not know if such decisions of this Court were even applicable in Arkansas. (R. 303–306)

Faced with the situation of whether to apply the "full apportionment" rationale of the Arkansas Supreme Court's 1979 decision in its *Montgomery Ward* case (as urged by the Petitioner), or the "unitary business principle" mandated by this Court's five previously cited decisions (as urged by the Respondent), the Chancellor in the trial court specifically ruled that the "unitary business principle" standard adopted by this Court had superseded the Arkansas Supreme Court's adoption of the "full apportionment" concept of the MTC promulgated income tax regulations. The Chancellor therefore found that ITW had correctly reported the capital gains from all six capital assets then still in dispute as

"nonbusiness income."

On appeal to the Arkansas Supreme Court, the Petitioner raised two issues. First, he alleged that the Chancellor had applied the wrong legal standards (because he had utilized the "unitary business principle," instead of the "full apportionment" standard previously approved by the Arkansas Supreme Court in its *Montgomery Ward* decision). Second, the Petitioner alleged that there was no evidentiary support for the Chancellor's factual findings that the activities of ITW's personnel in the acquisition, management and disposition of the questioned capital assets were not an integral part of the company's regular trade or business or that ITW and NIFCO, NISCO and CPI operated discrete businesses. Therefore, the Petitioner asserted that these factual findings by the trial court were "clearly erroneous."

Addressing both of these issues separately, the Arkansas Supreme Court acknowledged that this Court's five decisions rendered subsequent to its 1979 *Montgomery Ward* decision had established that the proper Due Process standard to utilize in such UDITPA cases was the "unitary business principle." The Arkansas court adopted and implemented this "unitary business principle" standard in this case and then specifically overruled its prior *Montgomery Ward* decision. In addition, the Arkansas Supreme Court held that the Petitioner's "full apportionment" income tax regulations and the Arkansas Revenue Policy Statement 1984-2 incorrectly interpreted the applicable provisions of UDITPA, and, therefore, were unconstitutional in the face of ITW's Due Process challenge. (Pet. App. A) The Arkansas Supreme Court examined the evidentiary record established in this case and specifically approved the trial court Chancellor's factual findings upon which he had based his determination that all of the capital gains realized by ITW from the five capital assets in dispute were "nonbusiness income." (Pet. App. A, A-8 and A-9)

The Petitioner has now filed this Petition for Writ of Certiorari wherein he appears to be asking this Court to reexamine its "unitary business principle" standard and to modify that

standard so as to apply the previously discredited "full apportionment" concept of the MTC promulgated UDITPA regulations. It also appears that the Petitioner is requesting this Court to review the factual findings of the state court (made in its interpretation of a matter of state statutory law) and to reverse the Arkansas Supreme Court's overruling of its own prior *Montgomery Ward* decision.

SUMMARY OF THE ARGUMENT

The Respondent submits that this Court should summarily deny this Petition for a Writ of Certiorari to the Arkansas Supreme Court for two reasons. First, the Arkansas Supreme Court correctly adopted and applied the "unitary business principle" standard mandated by this Court's prior decisions to the facts established in this case. There are no decisions of any other state appellate courts that conflict with the Arkansas Supreme Court's decision in this case in the application of the correct Due Process standards of the Fourteenth Amendment. Second, no federal question is presented by the Petitioner's request for this Court to review the state courts' factual findings that ITW's activities in acquiring, managing and disposing of the questioned capital assets were not an integral part of the company's regular manufacturing or leasing business. Therefore, since there is no conflict presented by the Arkansas Supreme Court's application of the Due Process standards mandated by this Court's prior decisions, and the Petitioner has failed to otherwise present a federal question for review, pursuant to the provisions of Rule 10 of the Court's Rules, this Petition for Certiorari should be denied.

REASONS FOR DENYING THE PETITION

For the two reasons discussed in detail below, the Respondent submits that there is no reason or basis for this Court to grant the Petition for Writ of Certiorari, as requested by the Petitioner.

I.

THE DECISION BY THE ARKANSAS SUPREME COURT IN THIS CASE DOES NOT CONFLICT WITH ANY DECISION RENDERED BY THE HIGHEST APPELLATE COURT IN ANOTHER STATE CONCERNING THE APPLICATION OF THE PROPER DUE PROCESS STANDARD TO BE APPLIED IN THIS TYPE OF DISPUTE.

The Petitioner argues that this Court should review the decision of the Arkansas Supreme Court in this case because the Arkansas court adopted and utilized an improper Due Process standard, in deciding the case for the Respondent. The Petitioner alleges that there is a conflict between the decision in this case and the decisions by several of the supreme courts of Arkansas' sister states in cases that involved similar questions of Due Process interpretation. (Pet. 19–22) The Respondent submits to the members of this Court that the Petitioner's allegations and arguments in this regard are in error; that the Arkansas Supreme Court properly applied the "unitary business principle" standard; and that there is no basis for this Court to review the decision rendered below because it does *not* conflict with decisions rendered by any other state supreme court involving similar questions.

Even the most cursory review of the Arkansas Supreme Court's decision below (Pet. App. A) reveals that the Arkansas court specifically: (1) reversed its prior decision in the case of *Qualls v. Montgomery Ward*, *supra*, (which decision had adopted the MTC promulgated "full apportionment" standard for determining "business income" and "nonbusiness income" for UDITPA

purposes); and (2) acknowledged and adopted the "unitary business principle" standard for Due Process analysis purposes, as mandated by this Court's decisions in the *Mobil Oil, Exxon, ASARCO, Woolworth* and *Container Corporation* cases.

In the *Container Corporation* case, this Court specifically stated, 463 U.S. at 175–176:

> [T]his Court will, if reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a "unitary business"....The legal principles defining the constitutional limits on the unitary business principle are now well established....[O]ur task must be to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment "was within the realm of permissible judgment." (Citations omitted)

The Arkansas Supreme Court clearly stated in its decision (Pet. App. A) that it acknowledged this Court's mandating of the use of the controlling "unitary business principle" in these type of cases; it adopted these principles for its analysis in this case; and it found that the capital gains in dispute were realized from capital assets the acquisition, management and disposition of which were *not* integral parts of the taxpayer's regular manufacturing and leasing businesses. Thus, under the standard of review set by this Court in the *Container Corp.* case, there is no basis for this Court's review of the decision below.

The Petitioner erroneously alleges that there is a conflict in the application of the proper "unitary business principle" standard, for Due Process purposes, by the Arkansas Supreme

Court and the highest appellate courts of other states. [2] The decisions of the supreme courts of New Jersey, [3] Maryland, [4] South Carolina, [5] and Colorado, [6] cited by the Petitioner as conflicting with the decision in this case, all are factually distinguishable, but they all adopted and applied the correct Due Process standard. In these cases where the state courts found the intangible income to be "business income," generally the investments were of a short term nature (i.e. less than twelve months), or they presented factual situations where the corporate taxpayer's activities incident to the acquisition, management and disposition of the capital assets were found to have been an integral part of the corporate taxpayer's regular trade or business.

Respondent submits that there have been decisions

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[2] The Petitioner seems to argue (Pet. 19–22) that these other decisions are in conflict because, in the application of the "unitary business principle" standard, some of the courts have determined that the questioned income from the intangible assets is "business income," while other courts have determined that the disputed income is "nonbusiness income" for UDITPA purposes. The Respondent submits that all of these cited decisions are reconcilable on their facts; none are in conflict; and, in all instances, the state appellate courts properly adopted and applied the controlling "unitary business principle" standard.

[3] *Silent Hoist & Crane Co. v. Tax Division Director*, 494 A.2d 775 (N.J., 1985), *cert. denied*, 474 U.S. 995 (1985); and *Bendix Corporation v. Director, Division of Taxation*, 592 A.2d 536 (N.J., 1991).

[4] *Comptroller v. Armco, Inc.*, 521 A.2d 785 (Md., 1987); and *NCR Corp. v. Comptroller*, 544 A.2d 764 (Md., 1988).

[5] *M. Lowenstein Corp. v. South Carolina Tax Comm.*, 378 S.E.2d 272 (S.C. Ct. App., 1989).

[6] *Lone Star Steel Co. v. Dolan*, 668 P.2d 916 (Colo., 1983).

rendered by the supreme courts of Virginia, [7] Ohio, [8] Florida, [9] and Missouri [10] that have reached the conclusion that the questioned income from the intangible asset in those particular cases was "nonbusiness income" for UDITPA purposes. Each of these decisions is compatible with the decision by the Arkansas Supreme Court in this case, and they are not in conflict with the cases cited in the preceding paragraph, because *all* of these state courts adopted and applied the controlling "unitary business principle" standard mandated by this Court's prior decisions. A good example of the fact that the proper application of the controlling Due Process standards to substantially different factual situations may well result in a differing classification of the intangible income (as either "business income" or "nonbusiness income" (without there being a conflict among the decisions)) is to be seen in the three cited *en banc* decisions of the Missouri Supreme Court in *IT&T, Phillip Morris* and *Williams Cos.* The differing results in UDITPA income classification by those three cases occurred because of different facts being presented in each case, though, in all three cases, the Missouri Supreme Court applied the same constitutional standards for Due Process purposes.

Both the Arkansas trial court and the Arkansas Supreme

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[7] *Corning Glass Works, Inc. v. Virginia Dept. of Taxation*, 402 S.E.2d 35 (Va., 1991), *cert. denied*, 60 L.W. 3218 (October 7, 1991).

[8] *American Home Products Corp. v. Limbach*, 551 N.E.2d 201, *cert. denied*, 111 S. Ct. 63 (1990).

[9] *Brunner Enterprises, Inc. v. Dept. of Revenue*, 390 So.2d 713 (Fla., 1980), *reversed and remanded*, 452 So.2d 550 (Fla., 1984).

[10] *James v. International Tel. & Tel. Corp.*, 654 S.W.2d 685 (Mo., *en banc*, 1983); *Philip Morris, Inc. v. Director of Revenue*, 760 S.W.2d 888 (Mo., *en banc*, 1988); and *Williams Cos. v. Director of Revenue*, 799 S.W.2d 602 (Mo., *en banc*, 1990) *cert. denied*, 111 S. Ct. 2916 (1991).

Court applied the controlling "unitary business principle" standard in analyzing whether the capital gains realized by ITW from its sale of stock in NIFCO, NISCO and CPI was "business income" or "nonbusiness income." Both courts found that the relationship between ITW and such companies was *not* "unitary," and that all of these companies conducted discrete and separate businesses. [11] Therefore, the trial court's specific factual findings that ITW's relationship with NIFCO, NISCO and CPI was *not* "unitary," fully supports the legal conclusion that the capital gains realized by ITW from the sale of the stock in these other three companies had nothing at all to do with the operation of the manufacturing and leasing businesses conducted by ITW, either within the State of Arkansas or worldwide. The proper application of the Due Process requirements of the Fourteenth Amendment allowed the Arkansas court to hold that the capital gains in question did not have a nexus with ITW's activities in the State of Arkansas, and, therefore, such gains were found to be constitutionally beyond the reach of the State of Arkansas for purposes of its corporate income tax. [12]

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[11] In this regard, the Petitioner's own counsel conceded at the administrative hearing level in this dispute that the capital gains and losses realized by ITW from the acquisition, management and disposition from the preferred stock in various utility and banking businesses constituted "nonbusiness income." This factual concession by the Petitioner's counsel is important, because it is an admission by the Arkansas Revenue Division that the operation of "discrete" business entities causes the income from the intangible asset to be "nonbusiness income."

[12] The Respondent submits that the Petitioner's argument that the Arkansas Supreme Court has improperly applied the "unitary business principle" standard in this case is nothing more than a thinly disguised attempt to have this Court again review the "full apportionment" concept for Due Process purposes that was specifically by this Court rejected in *ASARCO, supra*, 458 U.S. at 326, and *Woolworth, supra*, 458 U.S. at 363–364. The Arkansas Supreme Court noted in its decision below that the Arkansas Revenue Division's adoption of the MTC promulgated "full apportionment" regulations led that court to adopt and apply an improper Due Process standard in its *Montgomery Ward* decision. Though the Arkansas court rectified that error in its decision in this case by specifically overruling its earlier *Montgomery Ward* decision, the Petitioner is doggedly

II.

THE REQUEST OF THE PETITIONER FOR THIS COURT TO REVIEW THE FACTUAL FINDINGS OF THE ARKANSAS COURT, MADE IN INTERPRETING PROVISIONS OF STATE LAW, DOES NOT PRESENT A FEDERAL QUESTION WHICH IS A NECESSARY PREREQUISITE FOR THIS COURT'S REVIEW OF A STATE COURT DECISION.

The Petitioner further argues (Pet. 22–26) that this Court should grant his Petition and review the decision of the Arkansas Supreme Court, because that court (and supposedly the trial court) made an erroneous factual determination in interpreting Arkansas' statutory version of UDITPA. The Petitioner argues that the Arkansas Supreme Court erroneously affirmed the trial court's factual findings in this regard, in overruling its prior *Montgomery Ward* decision that had applied the "full apportionment" concept for Due Process purposes.

The Respondent submits that this argument presented by the Petitioner does *not* present a federal question for determination. At most, it presents an interpretation of state law, and, at the least, it is a request for this Court to review purely factual findings. The Respondent submits that neither of these reasons presents a proper case for the consideration of the members of this Court. Again, this argument appears to be nothing more than a thinly disguised attempt to resurrect the discredited "full apportionment" Due

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attempting to further deny the mandate of this Court that the "full apportionment" concept was ill founded and should not be used as a guideline for state corporate income tax administration. The Arkansas Revenue Division has attempted for the last seven years to limit or ignore the "unitary business principle" by refusing to apply it in any instance except disputes with multistate corporate taxpayers involving dividends. See, Arkansas Revenue Policy Statement 1984–2, *Arkansas CCH State Tax Reports*, ¶ 14,910.

Process standard that, if funds arose from or were contributed to the working capital of the corporation, such intangible income must necessarily be "business income" for UDITPA purposes. [13] This Court simply does not grant Petitions for Certiorari for the purpose of reviewing factual findings of state courts with regard to the interpretation of matters of state law.

Though the "business income" definitions of UDITPA have been adopted by nearly half the states that impose a corporate income tax, the provisions of Ark. Code Ann. § 26-51-701(a) defining "business income" *are* provisions of Arkansas state law. In applying the proper Due Process standards, the Arkansas trial court and the Arkansas Supreme Court made factual determinations in this case that the activities performed by the personnel of ITW's treasurer's office (all at the company's commercial domicile and headquarters in Chicago, Illinois) in the acquisition, management and disposition of the NIFCO, NISCO and CPI stocks, and the U.S. Treasury Notes and the single foreign currency hedging contract, were simply *not* activities that were an integral part of ITW's regular manufacturing or leasing businesses, either in Arkansas or worldwide. The evidentiary record established in this

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[13] The then General Counsel of the MTC, in commenting upon the MTC promulgated "full apportionment" UDITPA regulations, candidly admitted in 1976 that:

> "The UDITPA distinctions between "business" and "nonbusiness" corporate income appears to lack any rational basis and has created confusion for taxpayers and tax administrators alike. The Multistate Tax Commission has, therefore, concluded that the distinction should be eliminated by treating all corporate income as apportionable business income....[S]ince the Multistate Tax Commission is reluctant to recommend amendments to the Compact, it would be necessary to implement the "full apportionment" concept under UDITPA, the Commission has chosen to rely for the present upon its regulations to clear up as much of the confusion as possible...."

Dexter, *Taxation of Income From Intangibles of Multistate-Multinational Corporations*, 29 Van. L. Rev. 401, 407 (1976).

case clearly buttresses these specific factual findings, especially since each of these activities took up only a small part of the time of these corporate personnel; they were carried on only sporadically; the investments were held on a long term basis; and, of controlling significance, the activities had nothing whatsoever to do with the manufacturing and leasing activities conducted by ITW's operating divisions in the State of Arkansas.

Accordingly, the Respondent submits that the Petitioner has failed to raise a reviewable federal question in its second and third arguments set forth in his Petition. Such arguments do *not* present a proper basis for this Court to review the decision by the Arkansas Supreme Court in this case and the Petition for Certiorari in this case should therefore be denied.

CONCLUSION

For the foregoing reasons, the Respondent submits that this Court should deny the Petition for a Writ of Certiorari to the Arkansas Supreme Court because there is no conflict presented concerning a matter of federal law, the Arkansas Supreme Court applied the correct constitutional standards; and no federal question is presented with regard to the Petitioner's request for this Court to review the factual findings made by the state court in its interpretation of state law.

Respectfully submitted,

OCTOBER 16, 1991

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